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Divorce: When is the Doctrine of Comparative Rectitude Applied in Florida?

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from trespass actions in which the tort-feasor is liable for all direct consequences of the trespass.

The instant case is in accord with the basic principle of damages awarding the injured party just compensation for the actual loss suffered as a result of the tort-feasor's wrongdoing.¹³ It follows the value concept, suggested in the *Restatement of Torts*,¹⁴ that the measure of damages should be either the exchange value of the property destroyed or the value to the owner, whichever is the greater.

JOE C. JENKINS, JR.

DIVORCE: WHEN IS THE DOCTRINE OF COMPARATIVE RECTITUDE APPLIED IN FLORIDA?

Chesnut v. Chesnut, 33 So.2d 730 (Fla. 1948)

Complainant filed suit for separate maintenance. Respondent countered with answer and cross-bill, seeking divorce on grounds of extreme cruelty. The cross-bill was dismissed and complainant was awarded separate maintenance of \$85.00 per month. Respondent appealed. HELD, respondent should be granted a divorce and required to pay cost of litigation, attorney's fees for complainant, and lump sum alimony. The amount of the alimony was ordered to be arranged by the parties or by the chancellor if the parties failed to make a settlement amicably. Decree reversed.

The doctrine of comparative rectitude is a tenet of law applied in cases in which both parties seeking a divorce are guilty on statutory grounds, by which the chancellor may in his discretion award a divorce to the spouse with whom he finds the equities.¹ This doctrine is an exception to the recrimination theory and is used in cases in which it appears that the parties cannot possibly live together.² Under the recrimination rule, divorce is denied to either of two parties whose conduct evi-

¹³See *Florida E. C. Ry. v. McRoberts*, 111 Fla. 278, 282, 149 So. 631, 632 (1933).

¹⁴§911 (1939).

¹*Stewart v. Stewart*, 158 Fla. 326, 29 So.2d 247 (1947).

²*Goings v. Goings*, 90 Neb. 148, 133 N. W. 199 (1911); *Johnson v. Johnson*, 78 Wash. 423, 139 Pac. 189 (1914).

dences statutory grounds for divorce, for the reason that one coming into equity must come with clean hands.³ Although the Florida courts in the past have consistently approved the recrimination principle,⁴ in a recent case a divorce was awarded to the less guilty of the offending spouses.⁵ The dissent specifically pointed out that the majority, though they failed to state the fact, applied the doctrine of comparative rectitude.⁶ The decision, however, failed to establish clearly whether other behavior should be considered in addition to the statutory wrongs.⁷ The only instance in which recrimination is mandatory is that in which both parties are guilty of adultery.⁸

In the present case the careful comparison of offenses indicates that the Court is yielding to the temptation to make a judicial change in the old conception of recrimination as a defense in divorce actions and is weighing the respective equities of complainant and respondent. The courts have never found it necessary to compare the wrongs in order to award the wife alimony⁹ but have based such awards on the necessities of the wife and the financial ability of the husband.¹⁰ Nor has comparison of the guilt been necessary to grant a divorce to the party seeking it.¹¹ Many courts have reached a conclusion that would necessarily involve an application of the comparative rectitude doctrine, yet without language specifically stating that it is being used.¹² In one state, after a similar award of divorce based on a careful weighing of the testimony,¹³ the court in a decision refusing application of the comparative rectitude theory said that counsel had misapprehended the

³MacFadden v. MacFadden, 157 Fla. 477, 26 So.2d 502 (1946); Sahler v. Sahler, 154 Fla. 206, 17 So.2d 105 (1944); McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935).

⁴Sahler v. Sahler, 154 Fla. 206, 17 So.2d 105 (1944); McMillan v. McMillan, 120 Fla. 209, 162 So. 524 (1935); see Welch v. Welch, 112 Fla. 590, 152 So. 173 (1933); Chisholm v. Chisholm, 105 Fla. 402, 141 So. 302 (1932).

⁵Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1947).

⁶Stewart v. Stewart, 158 Fla. 326, 329, 29 So.2d 247, 249 (1947).

⁷Note, 1 U. OF FLA. L. REV. 62 (1948).

⁸FLA. STAT. §65.04 (1941).

⁹Collins v. Collins, 153 Fla. 10, 13 So.2d 445 (1943).

¹⁰Clark v. Clark, 155 Fla. 574, 20 So.2d 900 (1945).

¹¹Baldwin v. Baldwin, 151 Fla. 341, 9 So.2d 717 (1942).

¹²Longinotti v. Longinotti, 169 Ark. 1001, 277 S. W. 41 (1925); Dearth v. Dearth, 141 Pa. Super. 344, 15 A.2d 37 (1940).

¹³Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587 (1913).